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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. VICTORIA KELLER, Defendant and Appellant.	C085683 (Super. Ct. No. 16FE006115)

In March 2016 defendant Victoria Keller and two other individuals broke into a home and stole a wallet, checkbook, and prescription medication. She and her companions also stole the truck that was parked in the driveway.

In August 2017 a jury found defendant guilty of first degree residential burglary (Pen. Code, § 459; count one)[1] and felony vehicle theft (Veh. Code, § 10851, subd. (a); count seven). In September 2017 the trial court suspended imposition of sentence and

[1] Undesignated statutory references are to the Penal Code.

placed defendant on probation for five years. The conditions of probation included one year in county jail for count one and one year in county jail consecutive for count seven (or two years total). In imposing the jail terms, the trial court noted defendant had a "separate intent" in taking the car than in committing the burglary.

On appeal, defendant contends the trial court erred by failing to stay the "punishment" for count seven. She argues that under section 654, she cannot be subjected to multiple punishment because she had the same intent and objective in the burglary and the vehicle theft.

DISCUSSION

"Section 654 precludes multiple *punishment* for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, *punishment* for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. [Citation.] Section 654 does not allow any multiple *punishment*, including either concurrent or consecutive sentences. [Citation.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592, italics added.)

As defendant acknowledges in her brief, courts have held that the issue of whether count seven should be stayed under section 654 is premature because the court suspended imposition of sentence and defendant was granted probation; punishment has not yet been imposed. In *People v. Stender* (1975) 47 Cal.App.3d 413 (*Stender*), overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 240, the defendant was found guilty of burglary, rape, kidnapping, and attempted oral copulation. (*Stender*, at p. 416.) The trial court suspended imposition of sentence and granted probation, requiring the defendant to serve nine months in county jail. (*Ibid*.) The defendant argued the rape and attempted oral copulation sentences had to be set aside under section 654. (*Stender*, at p. 424.) The appellate court disagreed, finding that "no sentence was pronounced" because the trial court suspended imposition of sentence when it granted probation. (*Id.*

at p. 425.) The court reasoned that section 654 "proscribe[d] double *punishment*, not double conviction, and thus it is the double *penalty*, not the double conviction that is brought into question. . . . [Citation.] [¶] Probation is an act of grace and clemency designed to allow rehabilitation [citations] and is not within the ambit of the double punishment proscription of [section 654]." (*Stender*, at p. 425, italics added.)

A similar result was reached in *People v. Wittig* (1984) 158 Cal.App.3d 124 (*Wittig*), which concluded there was no double punishment issue for purposes of section 654 where the trial court had suspended imposition of sentence and granted three years of probation on the condition the defendant serve 90 days in jail. (*Wittig*, at pp. 126-127, 137.) "The section 654 issue should be presented to a court upon any future attempt to impose double punishment upon [the defendant] in the event of a probation violation." (*Wittig*, at p. 137.)

According to defendant, *Stender* and *Wittig* are distinguishable because the defendants in those cases were ordered to serve "relatively short amounts of time in jail as conditions of obtaining probation, in lieu of the much greater statutory punishment they would have otherwise received for their offenses." We find defendant's contentions without merit because the trial court ordered two years of jail as a probation condition, which is equal to the lowest potential punishment for count one (§ 459). In addition, as defendant acknowledges in her brief, the two-year probation condition does not violate section 19.2 because it was calculated based on consecutive terms for multiple convictions.[2]

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[2] Under section 19.2, "In no case shall any person sentenced to confinement in a county . . . jail . . . on a conviction of a misdemeanor, or as a condition of probation upon conviction of either a felony or a misdemeanor . . . or a conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year."

Defendant also argues *Stender* and *Wittig* are wrongly decided. According to defendant, it is "artificial" to apply section 654 only when a criminal defendant's punishment is served as part of a prison sentence, rather than as a probation condition. She also argues that refusing application of section 654 would result in the factual finding concerning whether the two crimes arose out of a single indivisible act being made by the judge revoking probation, rather than the trial judge.

We disagree with defendant that these are reasons to apply section 654 to circumstances to which the statute does not apply. By receiving probation, defendant has not been *punished* for her acts and her challenge under section 654 is premature.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

RENNER, J.